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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

REPUBLICAN CAUCUS OF THE
PENNSYLVANIA HOUSE OF REPRESENTATIVES,
Appellant

v.

RICHARD VIETH, *et. al.*
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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MAY 21, 2002

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QUESTION PRESENTED

Whether the doctrine of legislative privilege prohibits discovery of documents created within the "sphere of legitimate legislative activity" for state legislators engaged in enacting a congressional redistricting statute.

PARTIES

The parties to this appeal are the Republican Caucus of the Pennsylvania House of Representatives (Intervenor below and Appellant herein) and Richard & Norma Jean Vieth and Susan Furey (Plaintiffs below).

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JURISDICTIONAL STATEMENT

INTRODUCTION

In the underlying action, plaintiffs challenged the constitutionality of state legislation establishing congressional districts for the 19 seats apportioned to the Commonwealth of Pennsylvania after the 2000 federal census. Pursuant to 28 U.S.C. §2284(a), a three-judge court was convened to hear the challenge.

The present appeal involves a discovery dispute that arose when plaintiffs subpoenaed documents from a non-

party, a consultant that was providing research and analysis for the House Republican Caucus of the Pennsylvania General Assembly ("Caucus"). The Caucus opposed the subpoena on the ground that the documents were protected against disclosure by the common-law legislative privilege. The Caucus was permitted to intervene in the proceedings for the limited purpose of opposing the subpoena. The three-judge court (by order of a single judge) denied a motion for protective order.

The Caucus appealed the denial of the protective order to the United States Court of Appeals for the Third Circuit. The Court of Appeals notified the Caucus of a possible jurisdictional defect, based on 28 U.S.C. §1253, that could result in dismissal of its appeal. The Caucus opposed dismissal and also filed a parallel appeal to this Court. Since it is unlikely that the Court of Appeals will rule on the jurisdictional issue before May 21, 2002 (i.e., 60 days from the date of filing the notice of appeal to this Court), the Caucus submits this Jurisdictional Statement in accordance with Supreme Court Rule 18.3.

OPINION BELOW

No opinion supporting the order denying the motion for protective order was issued and the order is not reported. A copy of the order appears in the Appendix ("App.") at 1a.

JURISDICTION

As noted in the Introduction, prior to filing an appeal with this Court, the Caucus filed a timely appeal with the United States Court of Appeals for the Third Circuit (No. 02-1580) from the order of the three-judge

court denying the motion for protective order. App. at 2a. By letter dated February 28, 2002, counsel were advised by the Clerk of the Court of Appeals that the appeal had been listed for dismissal for lack of jurisdiction. App. at 4a-6a ("[i]t appears that the Court of Appeals lacks jurisdiction over the matter under 28 U.S.C. Section 1253"). Section 1253 provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order *granting or denying*, after notice and hearing, *an interlocutory or permanent injunction* in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. §1253 (emphasis added).

As the Court of Appeals requested, the Caucus submitted a letter brief, explaining its basis for urging that the Court of Appeals had appellate jurisdiction. App. at 7a-15a. The Caucus explained to the Court of Appeals that this Court's precedent interpreting Section 1253 supported appellate jurisdiction in the Court of Appeals for issues collateral to the merits of a challenge to the legality of a reapportionment plan. *See id.* at 11a-12a (citing, *inter alia*, *MTM, Inc. v. Baxley*, 420 U.S. 799 (1975) (Supreme Court without jurisdiction under Section 1253 to review order of three-judge court dismissing action on the basis of abstention); *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90 (1974) (Supreme Court without jurisdiction to review order of three-judge court dismissing claim for lack of standing); *In re Slagle*, 504 U.S. 952 (1992) (White, J., dissenting to explain reason for dismissal

of certified question) (mandamus petition to compel individual member of three-judge court to disqualify himself lies in court of appeals, not Supreme Court). Plaintiffs filed no response.

On March 22, 2002, to preserve its right of direct appeal should the Court of Appeals ultimately decline jurisdiction on the basis of Section 1253, the Caucus filed a protective and timely notice of appeal to this Court. App. at 16a. To date, the Court of Appeals has not resolved the jurisdictional issue or issued a briefing schedule in the appeal before it. The case manager assigned to the appeal informed undersigned counsel that, as of May 17, 2002, the jurisdictional issue had not yet been assigned to a panel for resolution.

The Caucus believes, for the reasons set forth in its letter brief to the Court of Appeals, that the Court of Appeals and not this Court has jurisdiction to hear the present appeal, which is truly collateral to the merits of the challenge to the redistricting statute. The Caucus files this Jurisdictional Statement in support of its protective appeal solely to preserve its right to a direct appeal. In situations involving a three-judge court where a party has appealed to the wrong court as between this Court and a court of appeals, this Court has acted to preserve the party's right to direct appeal. For example, in both *Gonzalez*, 419 U.S. at 101, and *MTM,* 420 U.S. at 804, this Court, after finding that the appeal before it should have been brought to the appropriate court of appeals, vacated the order of the three-judge court and remanded "so that a fresh order may be entered and a timely appeal prosecuted to the Court of Appeals." Similarly, in *Query v. United States*, 316 U.S. 486 (1942), where the opposite situation occurred, this Court stated:

> [T]he cause was a proper one for a three-judge court and appeal did not lie to the Circuit Court of Appeals. But a direction by us to the Circuit Court of Appeals to dismiss the appeal which the petitioners brought to it would, without more, terminate the litigation. For the time within which a direct appeal might have been brought to this Court under Section 266 has elapsed. *In the present circumstances, however, we think the petitioners' right to such an appeal should be preserved.* The judgment below is therefore vacated and the cause remanded to the district court for the entry of a fresh decree from which a timely appeal may be taken [to the Supreme Court] if the petitioners so desire.

Id. at 490-91 (internal citation omitted and emphasis added). *See also Walling v. James V. Reuter Inc.*, 321 U.S. 671, 677 (1944) ("When [the Supreme Court] is without jurisdiction to decide an appeal which should have been prosecuted to another court, it may vacate the judgment and remand the cause in order to enable the court below to enter a new judgment from which a proper appeal may be taken.").

In the present situation, there is no need to vacate the order below since the Caucus filed timely appeals to both the Court of Appeals and to this Court. However, the current state of the law regarding appeals from three-judge

courts under Section 1253 is confusing.[1] The Caucus reasonably believed it had correctly interpreted this Court's jurisprudence in appealing to the Court of Appeals. The Caucus, which is not a party to the case before the three-judge court on the merits, should not be punished through the loss of a direct right of appeal for its legally supportable position on jurisdiction in the court of appeals. As reapportionment cases are currently the only three-judge court cases using Section 1253 as a vehicle for direct appeal to this Court, it is imperative, in the interests of controlling the docket of this Court,[2] for the Court to monitor interpretation of that provision.

Accordingly, the Caucus believes that, in this unique situation, it would be appropriate and consonant

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[1] *See* 17 FEDERAL PRACTICE AND PROCEDURE §4040, 134 (1988 & 2002 Supp.) (exploring the "labyrinthian and even bizarre body of jurisdictional rules [that] has grown up around §1253"); Robert L. Stern et al., SUPREME COURT PRACTICE §§2.8-2.9 (7th ed. 1993) (citing the Freund Committee Report) ("[w]hen, where and how to obtain appellate review of an order by or relating to a three-judge court is a hopelessly complicated and confused subject ... review of these matters has become so mysterious that even specialists in this area may be led astray"). The fact that the Court of Appeals has potentially identified a jurisdictional defect is itself evidence of the uncertainty surrounding the interpretation of Section 1253.

[2] This Court has stated repeatedly that Section 1253 should be narrowly construed in light of the "historic congressional policy of minimizing the mandatory docket of the Court in the interest of sound judicial administration." *MTM*, 420 U.S. at 804; *see also Gonzalez*, 419 U.S. at 99.

with prior precedent recognizing the importance of preserving a party's direct right of appeal, for this Court to take one of four alternative actions. First, it could dismiss the present appeal for lack of jurisdiction, and include, in its order of dismissal, a statement that the Court of Appeals, as opposed to this Court, has jurisdiction over an appeal from an order denying a motion for protective order. Second, this Court could transfer the appeal presently before it for resolution by the Court of Appeals.[3] Third, this Court could stay its proceedings in this appeal pending resolution of the jurisdictional issue in the Court of Appeals and (a) if that court dismisses the appeal on the

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[3] There is presently no explicit authority for this Court to transfer an appeal filed under Section 1253 to the Court of Appeals. From 1922 to 1928, Section 238 of the Judicial Code allowed such a transfer. *See Street v. Shipowners' Association of the Pacific Coast*, 263 U.S. 334 (1923) (transferring appeal erroneously filed in Supreme Court to court of appeals pursuant to Section 238(a)); *Smith v. Apple*, 264 U.S. 274 (1924) (same). The current transfer provisions of 28 U.S.C. §1631 do not apply because they are limited to "courts" as defined in 28 U.S.C. §610, which definition does not include the Supreme Court. Nonetheless, as a transfer in this situation would be consonant with fairness and justice and "agreeable to the usages and principles of law," the Caucus believes that a transfer could be effected on the statutory authority of the All Writs Act, 28 U.S.C. §1651(a). *See Harris v. Nelson*, 394 U.S. 286, 298 (1969) (All Writs Act serves as a "legislatively approved source of procedural instruments designed to achieve 'the rational ends of law'") (quoting *Price v. Johnston*, 334 U.S. 266, 282 (1948)); *Pennsylvania Bureau of Corrections v. U.S. Marshals*, 474 U.S. 34, 42 (1985) (All Writs Act empowers federal courts to fashion remedies where the need arises).

basis of Section 1253, treat the present Jurisdictional Statement as a Petition for Writ of Certiorari, vacate the Court of Appeals' order and direct that it hear the Caucus' appeal, or (b) if that court decides to entertain the appeal, dismiss the present appeal. Fourth, should this Court, under any theory, determine that, for purposes of Section 1253, the issuance of compulsory process by a three-judge court is tantamount to the issuance of an injunction, this Court should note probable jurisdiction of the appeal before it and proceed to address the merits.[4]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no constitutional or statutory provisions directly involved in this matter. Federal Rule of Civil Procedure 26(b)(1), allowing for the assertion of privileges against discovery, is implicated, as is the Speech or Debate Clause of the United States Constitution, U.S. CONST., art. I, §6, which embodies the principles from which the common-law legislative privilege is derived.

STATEMENT OF THE CASE

As noted in the Introduction, the underlying action presented a challenge to legislation establishing 19 congressional districts in Pennsylvania following the 2000 federal census.[5] Named as defendants were the

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[4] It is in support of this fourth alternative that the Caucus offers the remainder of this Jurisdictional Statement.

[5] On April 8, 2002, the three-judge court declared the redistricting statute unconstitutional under the principle of one-person, one-vote and enjoined its implementation by

Commonwealth of Pennsylvania,[6] the Governor of Pennsylvania, the Secretary of the Commonwealth and the Commissioner of Elections ("Executive Officers"), as well as the Lieutenant Governor and President of the Senate of Pennsylvania and the Speaker of the House of Representatives of Pennsylvania ("Presiding Officers"). Plaintiffs were three individual voters, Richard & Norma Jean Vieth and Susan Furey. By order dated January 29, 2002, the three-judge court (Nygaard, C.J., Rambo, and Yohn, D.J.) established a hearing date of March 11-12, 2002 for the substantive challenges and issued a limited and expedited discovery schedule.

On February 8, 2002, plaintiffs served a subpoena *duces tecum* ("subpoena") on the Custodian of Records of the Carnegie Mellon University, seeking production of the following documents:

> (1) the contract between (a) the Pennsylvania House Republican Caucus and/or John Perzel and/or any related entity and (b) Carnegie Mellon University, the Pittsburgh Supercomputing Center, or any related individual or person relating to a demographic analysis of census data; an[d] (2) all communications, including request for maps or data, between Beverly Clayton and/or the Office of Sponsored Research (and its employees) and the Pennsylvania House Republican Caucus, any member of

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defendants. Three appeals from that order have been filed with this Court by the original parties to the action.

[6] The Commonwealth was dismissed as a defendant based on Eleventh Amendment immunity.

> that Caucus, and/or any employee or representative of any member pertaining to that contract.

App. at 18a.

On February 19, 2002, Presiding Officers, having only learned of the subpoena on February 18, 2002, moved to quash the subpoena, or alternatively, for a protective order. In their supporting brief, Presiding Officers argued that the subpoena should be quashed or a protective order should issue to prohibit the discovery as violative of the common law legislative privilege. App. at 20a, 22a. The Caucus sought, and was granted, leave to intervene for the limited purpose of joining the motion. App. at 37-43a, 44a-45a.

On February 22, 2002, the three-judge court (by order of a single judge) denied the motion to quash the subpoena and/or for protective order. App. at 1a (Rambo, J.). Immediately, Presiding Officers and the Caucus jointly sought a stay of this order. App. at 46a. However, on February 26, 2002, the court dismissed the stay request as moot because the documents had been produced by the non-party subject to the subpoena.[7] App. at 49a. As noted above, timely notices of appeal were then filed by the Caucus to the Court of Appeals for the Third Circuit and to this Court. App. at 2a, 16a.

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[7] On February 25, 2002, the Custodian of Records of the Carnegie Mellon University produced most of the documents requested. The Caucus is pursuing the appeals because the issue is an important one capable of recurring and repeatedly evading review and because such subpoenas are disruptive of the legislative process.

THE QUESTION IS SUBSTANTIAL

This appeal raises an issue of significant national importance as it pertains to the independence of state legislatures and individual legislators, and the integrity of the state legislative process. This Court should entertain the appeal (if the Court of Appeals does not) to ensure all state legislatures and legislators, in the course of carrying out their core legislative functions, freedom from interference by parties engaged in civil litigation in the federal courts.

A. Common Law Legislative Immunity

In *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), this Court recognized a common-law legislative immunity for state legislators that protects them, absolutely, from liability for actions undertaken "in the sphere of legitimate legislative activity." *See also Bogan v. Scott-Harris*, 523 U.S. 44 (1998) (unanimously reaffirming the existence of the common law legislative immunity and clarifying its extension to local legislators).

The common law legislative immunity recognized in *Tenney* (and subsequently extended to local and regional legislators) is co-extensive in civil matters with that provided members of Congress under the Speech or Debate Clause. *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 733 (1980) ("Although the separation-of-powers doctrine justifies a broader privilege for Congressmen than for state legislators in criminal actions, United States v. Gillock, 445 U.S. 360 ... (1980), we generally have equated the legislative immunity to which state legislators are entitled under §1983 to that accorded

Congressman under the Constitution.").[8] The federal Speech or Debate Clause, which provides immunity for federal legislators, was but a "reflection of political principles already firmly established in the States." *Tenney*, 341 U.S. at 373. The federal Speech or Debate Clause provides that "for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place." U.S. CONST., art. I, §6.

Legislative immunity is intended "to preserve the constitutional structure of separate, coequal, and independent branches of government." *United States v. Helstoski*, 442 U.S. 477, 491 (1979). As explained in *Tenney*: "'In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offence.'"

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[8] While this Court, in *United States v. Gillock*, held that the common law legislative privilege did not bar the introduction of evidence concerning a state legislator's support of legislation in a federal criminal action for bribery, this Court has not extended the *Gillock* rationale to civil matters involving state legislators and assertion of the privilege. Notably, *Supreme Court of Virginia* was decided less than three months after *Gillock* and the *Tenney* decision was recently reaffirmed in *Bogan*. To the extent, moreover, that *Gillock* may be read as a limitation on the viability and scope of the common law legislative privilege, recent decisions of this Court undermine the *Gillock* Court's reasoning. *See e.g., New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

341 U.S. at 373 (quoting II WORKS OF JAMES WILSON (Andrews ed. 1896) at 38); *see also Bogan*, 523 U.S. at 52 ("Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference."). "[T]he privilege was *not* born primarily of a desire *to avoid private suits* ... but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary." *United States v. Helstoski*, 442 U.S. at 491 (quoting *United States v. Johnson*, 383 U.S. 169, 180-81 (1966)) (emphasis added).

Tenney and subsequent cases recognize that the privilege operates to protect the process by which legislation is developed, as opposed to the interests of the individual legislator. The *Tenney* Court's explanation of why the privilege cannot be easily defeated shows this:

> We come then to the question whether from the pleadings it appears that *the defendants were acting in the sphere of legitimate legislative activity*. ... The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. ... The privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial *upon the conclusion of the pleader*, or to the hazard of a judgment against them based upon a jury's speculation as to motives.

Tenney, 341 U.S. at 377 (emphasis added); *see also Fletcher v. Peck*, 6 Cranch 87, 130 (1810) (not consonant with our

scheme of government for a court to inquire into the motives of legislators); *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) ("[i]nquiries into Congressional motives or purposes are a hazardous matter").

B. Legislative Immunity Extends to Discovery

The absolute legislative immunity recognized in *Tenney* extends beyond protection from liability and the right to be dismissed as a defendant from civil suit. It also provides legislators with protection from "the burden of defending themselves when engaged 'in the sphere of legitimate legislative activity.'" *Dombrowksi v. Eastland*, 387 U.S. 82, 85 (1967) (quoting *Tenney*, 341 U.S. at 376). A legislator cannot be questioned concerning legislative activities. *See Gravel v. United States*, 408 U.S. 606, 616, 629 (1972) ("[w]e have no doubt that Senator Gravel may not be made to answer – either in terms of questions or in terms of defending himself from prosecution – for the events that occurred at the subcommittee meeting").

Various Courts of Appeals have recognized that the immunity operates not only as immunity from suit but also as a privilege that protects legislators, and others performing legislative activities, from questioning in any context, including discovery. *See Miller v. Transamerican Press, Inc.*, 709 F.2d 524 (9th Cir. 1983) (allowing former congressman, as non-party deponent, to refuse to answer questions concerning his activities while a legislator); *MINPECO, S.A. v. Conticommodity Services, Inc.*, 844 F.2d 856 (D.C. Cir. 1988) (affirming decision to quash subpoenas issued to custodian of records and congressional subcommittee staff director for information and documents in the subcommittee's possession); *Brown & Williamson*

Tobacco Corp. v. Williams, 62 F.3d 408 (D.C. Cir. 1995) (affirming decision to quash subpoenas, issued to two members of a congressional subcommittee, for documents stolen from a law firm and provided to the subcommittee); *Burtnick v. McLean*, 76 F.3d 611 (4th Cir. 1996) (noting, in providing instructions on remand, that plaintiff would have to present the case without testimony of board members who abolished plaintiff's job). This "legislative privilege" (sometimes referred to as the "testimonial strand" of the immunity), ensures that the legislative process is, for the good of the public, protected from disruption.

C. Application

"Absolute legislative immunity attaches to actions taken 'in the sphere of legitimate legislative activity.'" *Bogan*, 523 U.S. at 54 (quoting *Tenney*, 341 U.S. at 376). The determination of "[w]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it" because "it [is] simply 'not consonant with our scheme of government for a court to inquire into the motives of legislators.'" *Id.* at 54-55 (quoting *Tenney*, 341 U.S. at 377). Document requests that seek information related to "actions taken in the sphere of legitimate legislative activity" are, accordingly, prohibited by the privilege.

The determination of whether the activity involved falls within the sphere of legitimate legislative activity is straightforward, as the Court of Appeals for the Third Circuit, relying on precedent of this Court, summarized in *Government of the Virgin Islands v. Lee*:

> In general [] the cases interpreting the Speech or Debate Clause in which

> legislative immunity has been triggered have involved manifestly legislative acts; acts which were so clearly legislative in nature that no further examination had to be made to determine their appropriate status. See e.g., United States v. Helstoski, 442 U.S. 477 (1979) (introducing proposed legislation); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) (subpoenaing records for committee hearing); Doe v. McMillan, 412 U.S. 306 (1973) (inserting material in the Congressional Record); Gravel v. United States, 408 U.S. 606 (1972) (introducing evidence during committee hearings); United States v. Johnson, 383 U.S. 169 (1966) (delivering a speech on the floor of the House); Tenney v. Brandhove, 341 U.S. 367 (1951) (interrogating witnesses during committee hearing); Kilbourn v. Thompson, 103 U.S. 168 (1881) (voting on resolutions) ... . [T]he acts themselves were obviously legislative in nature. *It is the very legislative character of these acts which triggers the protection of legislative immunity.*

775 F.2d 514, 522 (3d Cir. 1985) (parallel citations omitted, emphasis added).

The subpoena at issue here was necessarily addressed to legislative activities because it sought documents involving research requested and conducted in preparation for redistricting proposals. As this Court has stressed, redistricting is a legislative process. *See e.g.,*

Reynolds v. Sims, 377 U.S. 533, 586 (1964) ("legislative reapportionment is a matter for legislative consideration and determination"). The process of enacting legislation, including the investigation and evaluation done before a bill is introduced, is legislative activity. *See e.g.*, *Doe*, 412 U.S. at 313 (authorizing an investigation, holding hearings and preparing a report are all "integral part[s] of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation ..."); *Lee*, 775 F.2d at 521 ("factfinding, information gathering and investigative activities" are afforded legislative immunity); *Pentagen Technologies Int'l. Ltd. v. Committee on Appropriations of the United States House of Representatives*, 20 F. Supp.2d 41, 43-45 (D. D.C. 1998) (quoting *Eastland*, 421 U.S. at 504) ("the Supreme Court has concluded that the power to investigate falls within the legislative sphere because 'a legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change'"). As the documents requested were protected absolutely from disclosure, the three-judge court erred in denying the motion for protective order.

D. Importance of the Issue

The common-law legislative privilege has strong constitutional overtones where, as here, the authority of the federal courts provides the basis for the issuance of discovery that intrudes upon the state legislative process. Without a clear statement concerning the privilege's scope and application, private parties will continue to target legislators, legislative staff persons, and others involved in the legitimate legislative process to discover information

regarding the motivation and meaning behind legislative activity and enactments -- a hazardous and forbidden inquiry – and to disrupt and manipulate the legislative process itself, perhaps for self-interested ends. In the absence of a clarifying statement by this Court, there exists a prescription for like intrusion into "legislative activity" at every level of government of each of the fifty states, as well as the District of Columbia, Puerto Rico, the United States Virgin Islands and other governments operating under the auspices of the United States Constitution.

Moreover, on the specific issue of legislative activities related to redistricting, the federal courts are commencing what is likely to be another decade of litigation. In many, if not most cases, parties will use compulsory process to try to obtain information about redistricting from legislative bodies. The pressure of imminent elections will often, as here, lead district courts to sweep aside objections in order to conclude the litigation on the merits. This Court should provide guidance to the federal courts for the handling of issues of legislative privilege in redistricting litigation.

CONCLUSION

In this unique situation, where the Court of Appeals has noted a probable jurisdictional defect based on Section 1253, this Court should take one of four alternative actions. First, it could dismiss the present appeal for lack of jurisdiction, and include, in its order of dismissal, a statement that the Court of Appeals, as opposed to this Court, would have jurisdiction over an appeal from an order denying a motion for protective order. Second, the Court could transfer the appeal presently before it for resolution by the Court of Appeals. Third, the Court could

stay its proceedings in this appeal pending resolution of the jurisdictional issue in the Court of Appeals and (a) if that court dismisses the appeal on the basis of Section 1253, treat the present Jurisdictional Statement as a Petition for Writ of Certiorari, vacate the Court of Appeals' order and direct that it hear the Caucus' appeal or (b) if that court decides to entertain the appeal before it, dismiss the present appeal. Fourth, should this Court, under any theory, determine that Section 1253 encompasses the issuance of compulsory process by a three-judge court and therefore conclude that a direct appeal *does* lie from the discovery order at issue, this Court should note probable jurisdiction of the appeal before it and proceed to address the merits.

Respectfully submitted,

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